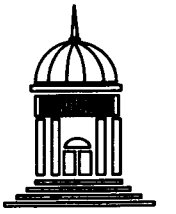
Office of Administrative Law



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The Office of Administrative Law (OAL) was established in Government Code section 11340 *et seq.* on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (APA) made by AB 1111 (McCarthy) (Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of all proposed regulations and regulatory changes against six statutory standards—authority, necessity, consistency, clarity, reference, and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted" (Government Code section 11340.1). OAL is authorized to disapprove or repeal any regulation that, in its determination, does not meet all six standards, or where the adopting agency does not comply with the procedural rulemaking requirements of the APA.

OAL is also authorized to review emergency regulations and disapprove those which are not necessary for "the immediate preservation of the public peace, health and safety, or general welfare..." (Government Code section 11349.6). Under Government Code section 11340.5, OAL is authorized to issue so-called "regulatory determinations" as to whether state agency "underground rules" which have not been adopted in accordance with the APA rulemaking process are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. In regulatory determinations, OAL analyzes (1) whether the agency accused of issuing or enforcing "underground regulations" is subject to the APA; (2) if so, whether the challenged policies are regulatory in nature and "standards of general application" under Government Code section 11340.5(a); (3) if so, whether the challenged policies implement, interpret, or make specific the law enforced or administered by the agency or govern its procedure, such that they are "regulations" under the APA; and (4) if so, whether the challenged policies are exempt from the APA's rulemaking requirements.

The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and maintaining. OAL also publishes the weekly *California Regulatory Notice Register*, which contains agency notices of proposed rulemaking, OAL disapproval decisions, and other notices of general interest.

The OAL Director is appointed by the Governor, and must be confirmed by the Senate. Former OAL Director Edward Heidig left the agency in January 1999, when his appointment by former Governor Pete Wilson—which had not yet been confirmed by the Senate—was withdrawn by incoming Governor Gray Davis. At this writing, Governor Davis has yet to appoint his OAL Director; Deputy Director Charlene G. Mathias is serving as OAL's unofficial acting director.

MAJOR PROJECTS

Regulatory Determinations

Following is a summary of regulatory determinations issued by OAL between May 1 and October 31, 1999:

♦ ***1999 OAL Determination No. 12, Docket No. 97-017 (May 7, 1999).*** Petitioner Larry McCarthy, president of California the Taxpayers' Association, questioned whether County Assessor Letter No. 86/75 issued by the State Board of Equalization contains a regulation which must be adopted pursuant to the APA. The letter, entitled "Airline Possessory Interests in Government-Owned Airports," states that the value of an airline's possessory interest in airport facilities must include the right to use runways (also known as "landing rights").

For the record, OAL noted that the policy reflected in the letter was rejected and superseded by 1998 legislation and by a 1998 regulation duly adopted by the Board; further, the Board rescinded the letter in January 1999. However, OAL considered whether the letter improperly contained a regulation while it was in effect.

Government Code section 15606 grants to the Board authority to adopt regulations governing property taxes. OAL determined that the Board is subject to the rulemaking requirements in the APA, and that the letter is a standard of general application intended to apply to all county assessors. OAL further concluded that the policy embodied in the letter interprets Government Code section 15606(c); Revenue and Taxation Code section 15606(g), which expressly requires the Board to "prescribe rules and regulations to govern local boards of equalization...and assessors...with respect to the assessment and equalization of possessory interests"; and Revenue and Taxation Code section 107, which defines the term "possessory interests."

In its response to the request for determination, the Board argued that its letters to assessors "are advisory only, and not binding or enforceable," and contended that Government Code section 15606(e) creates a "special exemption" to the APA rulemaking requirements for such uniformity-facilitating advice letters issued by the Board. Nine years ago, OAL rejected this same argument in 1990 OAL Determination No. 9, in which it concluded that part of the Board-issued "Assessors' Handbook" violated the APA. *[10:2&3 CRLR 46–47]* OAL reaffirmed its conclusion that section 15606 contains no express statutory exemption language that categorically exempts Board letters to county assessors from the APA's rulemaking requirements. OAL also found that the letter does not fall within any other recognized exemption to APA rulemaking requirements; as such, the policy expressed in the letter was invalid during the time it was in effect.

♦ ***1999 OAL Determination No. 13, Docket No. 97-018 (May 7, 1999).*** Petitioner Michael C. Manchester challenged five policies of the State Board of Control pertaining to the Victims of Crime (VOC) program, which is designed to assist California residents in obtaining restitution for pecuniary losses they suffer as a direct result of criminal acts. Specifically, Manchester challenged (1) the Board's Claims Verification Manual (and in particular the VOC Payment Schedule, Appendix L of the Income Loss and Reimbursements section); (2) a statement in a December 1996 letter from the Board stating that "VOC Program income loss awards are based on the net amount a claimant would have received had he or she been working at the time of the crime"; (3) the Board's alleged policy of not complying with Government Code section 13961(b)(2) by failing to provide information explaining the procedure to be used to evaluate an applicant's claim when providing application forms to inquirers; (4) the Board's alleged policy that new and additional evidence not reasonably available to the applicant at the time of the hearing must be deemed relevant by staff in order to be considered by the Board for purposes of requests for reconsideration; and (5) the Board's alleged policy of noncompliance with Government Code section 13962(a) by failing to return an incomplete application to the applicant.

In response, the Board contended that these policies "do not bind the public or the Board and therefore are not regulations." According to the Board, the challenged policies guide Board staff, who make recommendations to the Board; the Board is the final decisionmaker and is free to reject staff's recommendations after a hearing with the applicant. The Board further argued that the VOC Payment Schedule in its Claims Verification Manual is merely a restatement of existing law, and that the policy stated in its December 1996 letter is the only legally tenable interpretation of the applicable statutes and caselaw governing the VOC program.

OAL first determined that the Board is subject to the APA and its rulemaking requirements. OAL next determined that the Claims Verification Manual and the December 1996 letter apply to all California residents who submit claims for reimbursement under the Victims of Crime Program, such that they are standards of general application. As to the remaining three policies, the requester alleged they exist and the Board denied they exist. OAL noted that it lacks investigatory powers and is unable to make determinations of fact as to the truth or falsity of these contentions. Assuming that the policies exist, however, OAL found that they are also standards of general application.

OAL also noted that an agency's characterization of a challenged rule is less important than the nature of the effect and impact of the rule on the public.

OAL also noted that an agency's characterization of a challenged rule is less important than the nature of the effect and impact of the rule on the public. OAL determined that the Board's Claims Verification Manual and its VOC Payment Schedule "unquestionably" affect the public because they specify what documentation is required of the claimant to substantiate income loss and what the amount of the income loss award will be, such that both contain "regulations" that must be adopted pursuant to the APA. As to the December 1996 letter, the Board failed to respond to the requester's assertion that the policy contained in the letter differs from prior Board policy on that issue; as such, OAL found that "it would be difficult to accept the Board's argument that...[the policy] is now the only legally tenable interpretation of existing law." As to the three challenged policies, OAL found they are all "regulations" if they exist.

OAL further found that the challenged policies are not exempt from the APA's rulemaking requirements. Rejecting the Board's assertion that the policies are "internal management" policies exempt under Government Code section 11342(g), OAL noted that the internal management is narrowly interpreted and that "it is self-evident that the challenged rules extend well beyond mere management of the internal affairs of the Board, but are rather rules of general application affecting claims submission, verification, determination of award amounts, reconsideration, and other aspects of the VOC Program." As such, the challenged polices are invalid unless adopted pursuant to the APA's rulemaking process.

♦ ***1999 OAL Determination No. 14, Docket No. 97-019 (May 7, 1999).*** David Richards, an inmate at California State Prison at Solano, questioned whether specific rules adopted at one particular state prison, concerning restrictions on programs and activities for prisoners designated as Close B Custody, are regulations that must be adopted in compliance with APA rulemaking procedures.

Following its usual analysis, OAL concluded that the challenged policies are not "standards of general application" because they apply only to prisoners at one particular institution. Although the Department of Corrections is subject to the APA when adopting statewide regulations governing prisons, Penal Code section 5058(c) states that regulations "applying solely to a particular facility or other correctional facility" are not regulations, provided certain conditions are met. OAL further analyzed the specific rules at issue, and determined they address unique circumstances at Solano and do in fact apply only at Solano. Thus, the challenged policies need not be adopted pursuant to the APA's rulemaking procedures.

♦ ***1999 OAL Determination No. 15, Docket No. 97-020 (May 13, 1999).*** Petitioner Howard A. "Buzz" Spellman challenged "Board Policy Resolution #96–10" adopted by the Board for Professional Engineers and Land Surveyors (PELS). In BPR #96–10, PELS approved a document entitled "Fields of Expertise for Geologists and Civil Engineers," which PELS and the Board of Registration for Geologists and Geophysicists (BRGG) had drafted to differentiate between the responsibilities and duties of registered civil engineers (regulated

by PELS) and geologists (regulated by BRGG). "Fields of Expertise" identifies activities within the scope of practice of engineering and geology, reviews the "gray areas" where civil engineering and geology overlap, and lists activities that are normally performed by both professions.

OAL first concluded that PELS is subject to the APA, and that the challenged policy is a "standard of general application" that "applies to the professional activities of all civil engineers, and ostensibly, geologists as well." OAL further found that "Fields of Expertise" asserts that civil engineers may perform numerous tasks not mentioned in the Business and Professions Code and purports to establish a "qualitative" vs. "quantitative" distinction between functions that may be performed by geologists vs. civil engineers—a distinction that is not set forth in the Business and Professions Code. As such, the document interprets Business and Professions Code sections 6731, 6731.1, 6731.2, and 6731.3, which set forth the activities that constitute civil engineering. Finally, OAL found that "Fields of Expertise" does not qualify for any exemption to the APA's rulemaking requirement, thus requiring PELS to formally adopt the document as a regulation in order for it to be binding on licensees (see agency reports on PELS and BRGG for related discussion).

♦ ***1999 OAL Determination No. 16, Docket No. 97-021 (May 25, 1999).*** Frequent petitioner Louis R. Fresquez *[16:1 CRLR 205–06, 209]*, now an inmate at Avenal State Prison, challenged (1) the Department of Corrections' Administrative Bulletin 96/23 (AB 96/23), which requires hearing- and/or visually-impaired inmates to wear a yellow identification vest whenever outside the housing area, and (2) a January 1997 memorandum from the warden of Avenal which further amplifies on the policy contained in AB 96/23.

As noted above, the Department of Corrections is subject to the APA when adopting statewide regulations governing prisons. OAL found that both policies are "standards of general application" in that they apply to all members of a class of inmates, and that both policies interpret Penal Code section 5054. However, OAL found that AB 96/23 falls within a special exemption to the APA rulemaking requirement set forth in Penal Code section 5058(d), which exempts "regulations adopted by the director or the director's designee applying to any legislatively mandated or authorized pilot program." OAL confirmed that the Department filed AB 96/23 with OAL as a pilot program in October 1996; thereafter, the Department adopted section 3999.1.2, Title 15 of the CCR, which became effective in December 1996. Thus, when Mr. Fresquez filed his petition in November 1997, the approved regulation (which is exempt from OAL review) was in effect. Effective October 1998, section 3999.1.2 lapsed by operation of law, but the Department is required to continue operating the pilot program pursuant to the terms of a court order in *Armstrong v. Davis*. Finally, OAL found that the January 1997 memorandum is exempt from the APA's rulemaking requirement under Penal Code section 5058(c), because it is a local rule intended to apply at only one prison.

♦ ***1999 OAL Determination No. 17, Docket No. 98-001 (August 6, 1999).*** Petitioner Eastman Chemical Company challenged the public health goal for the industrial chemical DEHP by the Office of Environmental Health Hazard Assessment (OEHHA). Used in making polyvinyl chloride plastic, DEHP is a plasticizer which renders the material soft and malleable. Eastman is one of the principal manufacturers and distributors of DEHP.

The California Safe Drinking Water Act requires the Department of Health Services (DHS) to regulate the concentrations of contaminants in public water supplies by, among other things, adopting regulations that specify the maximum contaminant level (MCL) for each contaminant. The MCL for a contaminant is established by a two-step risk assessment/risk management process: (1) OEHHA, part of the California Environmental Protection Agency, evaluates the risk to public health posed by a contaminant and, based on the results of the risk assessment, adopts a public health goal (PHG), which is the level at which the contaminant will (a) cause no known or anticipated adverse effect on human health, plus a margin of safety, if the contaminant is acutely toxic, or (b) pose no significant risk to health, if it is a carcinogen or otherwise causes a chronic disease; and (2) after OEHHA establishes the PHG, DHS then adopts the MCL, which must be set as close to the PHG as is feasible.

In December 1997, OEHHA adopted the final PHG for DEHP. OEHHA determined that DEHP is a carcinogen, a teratogen (a substance causing birth defects), and a reproductive toxicant (a substance causing testicular damage), and set the PHG for DEHP at 12 parts per billion (ppb) based on its potential to cause cancer. Eastman filed this petition for determination with OAL on February 13, 1998, charging that the PHG (including its specific findings that DEHP is a carcinogen, a teratogen, and a reproductive toxicant, and its establishment of the PHG at 12 ppb) is, in effect, a regulation that OEHHA should have adopted in compliance with the APA's rulemaking requirement. In May 1998, Eastman filed suit in Sacramento County Superior Court, making the same allegations. In September 1998, the court issued a brief ruling finding that the PHG for DEHP is not subject to the APA. According to OAL, "the court stressed that the Health and Safety Code prohibited the state from requiring water agencies to comply with public health goals. The court also stated that 'mere scientific judgments' are not quasi-legislative in nature and not appropriate for review by OAL. The appellate court declined to overrule the trial court's decision. In February 1999, SB 635 (Sher) was introduced to clarify that OEHHA's publication of a PHG in a risk assessment is not a regulation that must be adopted pursuant to APA rulemaking procedures. AB 635 was pending at the time of OAL's determination, but has since been enacted (see LEGISLATION).

Following its usual analysis, OAL determined that the APA's rulemaking requirements are generally applicable to OEHHA's quasi-legislative enactments. OAL then disagreed with both OEHHA and the superior court in finding that the

PHG is a "standard of general application" which appears to apply directly to at least three classes (public water agencies preparing statutorily-mandated annual consumer confidence reports concerning substances for which goals are set by OEHHA, members of the DHS staff who regulate the concentrations of contaminants in public water supplies, and persons interested in taking part in the development of regulations that designate particular chemicals as health hazards and set maximum concentrations for those chemicals) and indirectly to all persons who will either provide or consume drinking water supplied pursuant to final, duly adopted regulations, which by law must include a maximum DEHP level set as close as possible to the corresponding PHG. OAL further found that the challenged policies interpret Health and Safety Code section 116365, which directs OEHHA to adopt a PHG for each drinking water contaminant regulated or proposed to be regulated by DHS.

OAL determined that the policies implement Government Code section 20190, which authorizes the Board to invest the PERS fund, by attempting to ensure that the PERS Board's members' voting on investments are not subject to improper influence, such that they are "regulations" within the meaning of the APA.

Finally, OAL found that OEHHA's identification of DEHP as a teratogen and as a reproductive toxicant, and its determination that a maximum of 12 ppb of DEHP may safely be allowed in drinking water, are not exempt from the APA's rulemaking requirements. However, OEHHA's determination that DEHP is a carcinogen is exempt from the APA, because DEHP is included in California's Proposition 65 list of chemicals known to the state to cause cancer, a list expressly exempted from the requirements of the APA by Health and Safety Code section 25249.8(e).

As noted, SB 635 (Sher) (Chapter 777, Statutes of 1999) supersedes this OAL determination and provides that OEHHA's formulation and publication of a PHG are not subject to the APA.

♦ ***1999 OAL Determination No. 18, Docket No. 98-002 (August 11, 1999).*** Petitioner James McRitchie challenged Policy Resolutions BD-98-01, BD-98-02, and BD-98-03, and a document entitled "California Public Employees' Retirement System Disclosures, Implementing Procedures (4/1/98)," adopted by the Board of Administration of the Public Employees Retirement System (CalPERS). The policy resolutions concern the solicitation and receipt of contributions and gifts by CalPERS fiduciaries, and authorize the CEO of CalPERS to implement the resolutions. Subsequently, the Board issued the three-page "implementing procedures" document requiring disclosure of solicitations, gifts, and contributions for the stated purpose of assuring that fiduciaries of the retirement system perform their duties in an impartial manner. After unsuccessfully petitioning CalPERS to adopt the resolutions and implementing procedures under the APA rulemaking process, Petitioner McRitchie filed this petition with OAL. In a separate proceeding, a political action committee challenged the validity of two of the resolutions in Sacramento County Superior Court; in September 1998, the court enjoined CalPERS from enforcing resolutions BD-98-01 and BD-98-02 because they "were promulgated without compliance with the Administrative Procedure Act."

OAL first found that the CalPERS Board is subject to the APA, and that the challenged policies are "standards of general application" because they apply generally to all fiduciaries and to parties who are doing or seeking to do business for gain with CalPERS. OAL further determined that the policies implement Government Code section 20190, which authorizes the Board to invest the PERS fund, by attempting to ensure that the PERS Board's members' voting on investments are not subject to improper influence, such that they are "regulations" within the meaning of the APA. Finally, OAL found that the challenged policies are not exempt from the APA, and that this regulatory determination proceeding is not moot merely because the Board began rulemaking proceedings to properly promulgate resolutions BD-98-01 and BD-98-02 after the court decision.

♦ ***1999 OAL Determination No. 19, Docket No. 98-003 (August 12, 1999).*** Petitioner D. Richardson, an inmate at Folsom Prison, challenged the Department of Corrections' Administrative Bulletin 98/05 (AB 98/05), which establishes the Structured Punishment Work Detail Pilot Program (SPWDPP). The SPWDPP is intended to reduce the rate of inmates returning to prison as parole violators by requiring them to participate in a program of intense manual labor assignments, without pay and with only limited privileges. AB 98/05 establishes placement criteria, program requirements, and sanctions for refusing to work.

As noted above, the Department of Corrections is subject to the APA when promulgating statewide prison regulations. OAL determined that, because it applies to all members of a class, AB 98/05 is a "standard of general application," and that it interprets Penal Code section 5054. However, as noted in Determination No. 16 above, Penal Code section 5058(d) exempts regulations establishing a legislatively mandated or authorized pilot program from the APA's rulemaking requirements. OAL noted that the Department did in fact file SPWDPP regulations in February 1998; those regulations were approved as section 3999.1.4, Title 15 of the CCR, and were in effect at the time petitioner filed his request for determination. OAL concluded that, to the extent that AB 98/05 merely restates section 3999.1.4, it is exempt from the APA's rulemaking requirements and OAL review. However, parts of AB 98/05 either differ from the language in section 3999.1.4 or are not covered in the regulation; OAL concluded that those provisions are not exempt and must be adopted pursuant to the APA.

♦ ***1999 OAL Determination No. 20, Docket No. 98-004 (August 24, 1999).*** Petitioner Andre Nizetich questioned whether a requirement of the Department of Consumer Affairs' Barbering and Cosmetology Program stating that only one apprentice may be designated to each licensee who is an approved trainer is a regulation which must be adopted pursuant to the APA.

OAL first determined that the Program is subject to the APA, and that—because it applies to all persons applying to the Program to become an apprentice in cosmetology or to train such apprentices in California—the challenged policy is a "standard of general application." As to whether the policy interprets or implements existing law, Business and Professions Code section 7332 provides: "An apprentice is any person who is licensed by the board to engage in learning or acquiring a knowledge of barbering, cosmetology, skin care, nail care, or electrology, in a licensed establishment under the supervision of a licensee approved by the board." Thus, the Program argued that the challenged policy is a restatement of existing law. However, OAL found that nothing in existing statute expressly states that only one apprentice may be assigned to an approved licensee, such that the policy interprets section 7332. Because the policy is not exempt from the APA's rulemaking requirements, OAL concluded that it is a regulation that is without legal effect unless adopted pursuant to the APA.

♦ ***1999 OAL Determination No. 21, Docket No. 98-005 (October 4, 1999).*** Petitioner Fred Price, an inmate at Lancaster State Prison near Los Angeles, challenged several California Department of Corrections (CDC) rules contained within section 62010.7.3 of the California State Prison, Los Angeles' "Operational Supplement to the CDC Operations Manual" (operational supplement). The challenged policies are contained in a supplement to CDC's "Department Operations Manual" (DOM), which has been the subject of extensive litigation and numerous OAL regulatory determinations. In 1991, a California court of appeal ordered CDC to cease enforcing the regulatory portions of the DOM; following that decision, CDC began a review of the DOM and has since codified a substantial number of DOM's underground regulations in the CCR. *[16:1 CRLR 205]* According to OAL, however, "much remains to be done."

The Department of Corrections is subject to the APA when promulgating statewide prison regulations, but "local rules" applicable to only one particular facility are exempt from the APA under Penal Code section 5058(c).

As noted above, the Department of Corrections is subject to the APA when promulgating statewide prison regulations, but "local rules" applicable to only one particular facility are exempt from the APA under Penal Code section 5058(c). OAL found that section 62010 contains standards of general application "because they apply to all members of an open class." OAL then focused on the specific rules challenged by Price to determine whether they interpret existing law, and made the following findings: (1) the operational supplement's policy prohibiting family visits for prisoners classified as Close A Custody is a restatement of existing section 3174, Title 15 of the CCR; (2) other rules in section 62010.7.3 governing housing and work assignments for Close B Custody inmates at Los Angeles Prison are regulations, but are exempt from the APA under Penal Code section 5058(c) because they apply solely to inmates at that particular facility; and (3) challenged rules establishing minimum terms for inmates in Close B Custody are regulations because they implement Penal Code section 5054, and they are not exempt from the APA under Penal Code section 5058(c) because they originated at CDC headquarters (not Los Angeles Prison) and are intended to apply statewide throughout the prison system.

♦ ***1999 OAL Determination No. 22, Docket No. 98-007 (October 5, 1999).*** Carl D. McQuillion, an inmate at the California Men's Colony at San Luis Obispo, filed this petition in October 1998 challenging three documents: (1) "Close Custody Criteria for Male Inmates," issued by the California Department of Corrections (CDC) in September 1997; (2) the California Men's Colony's "Operations Manual Supplement for Volume VI" of CDC's Operations Manual issued by the warden of the California Men's Colony at San Luis Obispo; and (3) a June 1998 memorandum entitled "Security Enhancements," issued by the warden of the California Men's Colony at San Luis Obispo.

As noted above, the Department of Corrections is subject to the APA when promulgating statewide prison regulations. OAL found that all of the challenged policies are "standards of general application" because they apply to male inmates generally, and that they interpret Penal Code sections 5054 and/or 5068. Analyzing available exemptions from the APA, OAL ruled that the "Close Custody Criteria" document is not exempt and must be adopted pursuant to the APA. Because the Operations Manual Supplement and June 1998 memo apply solely to inmates at the California Men's Colony at San Luis Obispo, they appear to be "local rules" exempt from the APA under Penal Code section 5058(c). However, upon closer examination, OAL determined that the Operations Manual Supplement did not originate at the California Men's Colony at San Luis Obispo; it originated at CDC headquarters, and is intended to apply statewide throughout the prison system. As such, it is not exempt as a "local rule" and must be adopted pursuant to the APA. OAL determined that the June 1998 memo, which describes increased security measures being taken at the California Men's Colony at San Luis Obispo as a result of an attempted escape, is a "local rule" exempt from the APA under Penal Code section 5058.

♦ ***1999 OAL Determination No. 23, Docket No. 98-008 (October 8, 1999).*** Petitioner James D. Jensen challenged the validity of a statement made in a letter from the Department of Consumer Affairs' Structural Pest Control Board (SPCB).

Jensen had complained to SPCB about one of its licensees, a pest control company called Cal Western, and—according to OAL—the Board had "previously undertaken successful action to secure Mr. Jensen's rights under a Cal Western pest control agreement at least three times." When Cal Western cancelled Jensen's agreement, however, SPCB informed Jensen that the cancellation of an agreement is a contractual dispute "which is not within the jurisdiction of the Board," and suggested that Jensen file a civil action against the company.

OAL found that SPCB is subject to the APA. OAL also found that SPCB both had and took jurisdiction over Jensen's complaint, which tends to imply that the Board does not have the policy of which Jensen complains. After reviewing correspondence between SPCB and Jensen, OAL concluded that "the record does not contain sufficient facts to definitively answer the question of whether the alleged policy exists." Thus, OAL made alternative findings: (1) if the Board does not have a policy that precludes it from assisting consumers involved in contractual disputes with the Board's licensees, then the letter alleged to be a "policy" is not a "regulation"; and (2) if the Board has issued or utilized a general rule that provides the basis for denying assistance to consumers involved in disputes with its licensees when those disputes arise from interpretation of a contract, then the policy is one that interprets Business and Professions Code sections 108, 129, and 8520(b), and is a "regulation" subject to the APA.

OAL dispensed with SCO's argument that it should not entertain this request because "the APA does not apply to requesters who are not private persons or entities," such that SDUSD has no "standing" to file the request. According to OAL, "no requirement whatsoever for 'standing' is attached to a request for determination pursuant to Government Code section 11340.5."

◆ ***1999 OAL Determination No. 24, Docket No. 98-009 (October 21, 1999).*** Michael J. Thomas, an inmate at Pelican Bay State Prison, challenged a rule prohibiting inmates from receiving printed material downloaded from the Internet which is enclosed in incoming mail, as articulated in a Pelican Bay State Prison memo dated May 6, 1998.

As noted above, the Department of Corrections is subject to the APA when promulgating statewide prison regulations, but "local rules" applicable to only one particular prison facility are exempt from the APA under Penal Code section 5058(c). Although OAL found that the challenged rule interprets numerous sections of the Penal Code, it also examined the entire record of the matter and found that the rule "represents an individual warden's response to particular circumstances present at Pelican Bay State Prison, and is limited in its application to that one facility." Thus, the rule is exempt from the APA.

◆ ***1999 OAL Determination No. 25, Docket No. 98-010 (October 29, 1999).*** In this matter, petitioner San Diego Unified School District (SDUSD) questioned whether guidelines in the "Open Meeting Act Chapter 641/86 Adjustment Worksheet" and "State Controller's Office, Division of Accounting and Reporting, Open Meeting Act Claim Review Procedures" issued by the State Controller's Office (SCO) are regulations that must be adopted pursuant to the APA.

The SCO superintends the fiscal matters of the state. Money may be drawn from the California Treasury only upon a SCO warrant. By statute, the SCO will not draw a warrant for any claim until it has been audited by the SCO as required by law. In 1986, the legislature amended the Brown Open Meeting Act, applicable to local government agencies, to require them to prepare and post an agenda containing a brief general description of each item of business to be discussed at an upcoming meeting at least 72 hours prior the meeting. The legislation also provided that the state would reimburse local agencies for their costs in publishing the required agendas.

Petitioner SDUSD claimed that, in the guidelines in the challenged documents, SCO "determined that the preparation and description of items on an agenda (including writing or composing the description, typing the description, and reviewing and editing the description) requires 30 minutes per page of agenda. The SCO further determined that the posting of an agenda requires five minutes. The SCO applied these 30 minutes per page and five minutes per agenda time periods as general standards, establishing the maximum amount that the SCO would approve for payment."

Preliminarily, OAL dispensed with SCO's argument that it should not entertain this request because "the APA does not apply to requesters who are not private persons or entities," such that SDUSD has no "standing" to file the request. According to OAL, "no requirement whatsoever for 'standing' is attached to a request for determination pursuant to Government Code section 11340.5." OAL also rejected SCO's argument that it—as an agency created in the state constitution—has authorities that "cannot be restricted by legislative enactment" such that it is not subject to the APA. OAL found that the legislature has frequently enacted statutes "delineating" SCO's authority to audit claims against the state, including the Brown Act amendments at issue in this matter (which require rigorous SCO review of claims for reimbursement filed by local governments for compliance with the agenda requirements in the amendments).

OAL then analyzed the guidelines to determine whether they constitute "standards of general application." SCO contended that the reimbursement limitation "was merely a reference point and not used in every single case by the auditor and, therefore, was not a standard of general application." OAL disagreed, finding that an auditor using the SCO's "Adjustment Worksheet" and "Claim Review Procedures" documents "would most likely believe the 30 minutes per page and five minutes per agenda standard as being *mandatory* and, if not, certainly *very highly recommended*" (emphasis

original). Thus, OAL concluded that the limitation was a standard of general application; further, OAL found that the limitation in the challenged documents interprets the statutory auditing responsibilities of the SCO under Government Code sections 12410, 925.6, 17561, and—with respect to its duty to audit Brown Act reimbursement claims—54954.4. Finally, OAL found that the limitation is not exempt from the APA's rulemaking requirements under any express or special exemption. Thus, the SCO's limits are invalid because they should be been adopted pursuant to the APA.

OAL Modifies Regulatory Determination

On September 23, OAL modified OAL Determination No. 4, Docket No. 97-009, which was originally issued on January 8, 1999. In that determination, requester David W. Finney challenged Administrative Directive No. 83/2 (AD 83/2) of the Board of Prison Terms. That directive provides that life prisoners whose offenses were committed before July 1, 1977 (such that they were sentenced under the state's Indeterminate Sentence Law or "ISL") and who have been found suitable for parole under post-1977 guidelines are entitled to have parole dates set under pre-July 1, 1977 guidelines. July 1, 1977 is the effective date of the Uniform Determinate Sentencing Law (DSL), which replaced the ISL. With that law, the legislature declared that the purpose of imprisonment is punishment and not rehabilitation, as had been the state's prior position.

In a letter dated January 21, 1999, the Board requested that OAL modify its determination in five respects, based upon new arguments and new caselaw not cited in its original response to the request.

The Board contended that AD 83/2 is merely a restatement of the law established in three court decisions, including *In re Stanworth*, 33 Cal. 3d 176 (1982), a California Supreme Court decision holding that a prisoner who had been sentenced to life imprisonment under the ISL is entitled to have his parole release date determined under both the ISL and DSL and to the benefit of the earlier release date of the two standards. OAL analyzed *Stanworth* and the other case holdings cited by the Board, and found that AD 83/2 is more than a mere restatement of those holdings; rather, it interprets, implements, and in one provision apparently conflicts with the law established in those cases. Thus, OAL held that the portions of AD 83/2 that are more than mere restatements of law are underground regulations and invalid unless adopted according to the APA. *[16:2 CRLR 175]*

In a letter dated January 21, 1999, the Board requested that OAL modify its determination in five respects, based upon new arguments and new caselaw not cited in its original response to the request. First, the Board argued that section 7.d. of AD 83/2, which provides that an inmate may not be represented by an attorney or any other advocate at a Parole Board hearing, is a direct implementation of *Stanworth* and another case not cited in its prior papers, *In The Matter of Richard Demond*, 165 Cal. App. 3d 932 (1985). In *Demond*, the court stated: "The impact of *Stanworth* was merely to put the life prisoner in the same position he was prior to the enactment of the DSL. There was no right to counsel then and neither Penal Code section 3041.7 nor section 3065 have changed the picture." OAL thus agreed with the Board that section 7.d. of AD 83/2 is a restatement of the law as it existed prior to July 1, 1977.

Next, the Board argued that section 7.g. of AD 83/2 is also a restatement of former Board rule 2118, which was applicable prior to July 1, 1977. Section 7.g. is entitled "Record of the Hearing," and provides that "the hearing shall be recorded using whatever means the Board finds accurate and efficient. Upon request the Board shall send a copy of the decision to the prisoner." However, former Board rule 2118 provides that "every inmate will receive a written summary of the hearing" and "every inmate upon request will receive a copy of a tape recording of the hearing if one was made by the parole board." OAL found that section 7.g., which states only that a copy of the *decision* will be sent to the prisoner, varies from and is not a restatement of section 2118, which grants a right to a "written summary of the hearing" and "a copy of the tape recording" if one was made. Thus, section 7.g. is not a restatement of existing law but a regulation that must be adopted pursuant to the APA.

The Board also contended that section 7.c. is a restatement of existing law. Section 7.c. specifies that prisoners shall have the rights specified in sections 2110-2119 at their parole hearings; the cited sections were the applicable sections in the California Administrative Code (now the California Code of Regulations) prior to July 1, 1977. Applying the rule in *Demond* (see above), OAL agreed that section 7.c. is a restatement of the law as it existed prior to July 1, 1977.

Next, the Board argued that sections 3.a., 3.b., and 3.c. of AD 83/2 fall within established exemptions to the APA. Specifically, the Board argued that sections 3.a. (which states that the Department of Corrections will notify prisoners of their rights to a parole board hearing as soon as possible) and 3.b. (which states that prisoners who are not notified regarding a parole board hearing but believe they are eligible should file an appeal as soon as possible) fall within the "internal management" exception to the APA under Government Code section 11342(g). Noting that the "internal management" exception is very narrowly construed and will be applied only when a challenged policy (1) affects only the employees of the issuing agency and (2) does not address a matter of serious consequence involving an important public interest, OAL rejected the Board's contention. According to OAL, sections 3.a. and 3.b. "affect more than the employees of the Board. Employees of the Department of Corrections (a separate agency) are also affected. Of course, the prisoners themselves are the most significantly impacted."

OAL also noted that the copy of AD 83/2 provided to it during the original determination proceeding contained no subsection 3.c., and "for this reason OAL did not discuss this subsection."

LEGISLATION

AB 486 (Wayne), as amended June 30 and sponsored by the California Law Revision Commission, would have made two major changes in the APA's rulemaking provisions. First, the bill would have prescribed a procedure under which an agency could render, upon request by interested persons, a "nonbinding advisory interpretation" of statutes, regulations, agency orders, court decisions, or other legal provisions enforced or administered by the agency. Under the bill's provisions, any interested person would be able to request in writing that OAL review such an advisory interpretation pursuant to specified procedures. The requester would also be able to obtain a judicial declaration as to the validity of the advisory interpretation by bringing an action for declaratory relief in superior court. The bill would also have created a new procedure for agency adoption of regulations determined to be noncontroversial. Under that procedure, "consent regulations" would be exempt from normal APA rulemaking procedure and would be subject to a shorter adoption process. No proposed regulation could be adopted as a consent regulation if any adverse comment about it is received by the agency.

Governor Davis vetoed AB 486 on October 8. In his veto message, the Governor noted that "although the provisions of this bill are optional, the concern is that the public will confuse an advisory interpretation, which is a nonbinding expression of the agency's interpretation of the law it enforces, with a legally binding regulation. The procedure prescribed for adopting an advisory interpretation is much the same as the procedure for adopting a regulation. An advisory interpretation would have no legal effect; would be entitled to no judicial deference; could not prescribe a penalty or course of conduct, confer a right, privilege, authority, exemption, or immunity, impose an obligation, or in any way bind or compel; and could not be used as an alternative means of adopting binding regulations. There is a potential that advisory interpretations could ultimately become underground regulations." Governor Davis also noted that recent amendments to the APA have authorized agencies to issue "declaratory decisions" (Government Code section 11465.10) and that agencies have various other methods by which they may publicize their interpretation of the laws they enforce.

As to the consent procedure for noncontroversial regulations, the Governor stated that "existing law already provides a shortened and efficient process for adopting noncontroversial regulations. The provisions of AB 486 are duplicative of existing law and, therefore, unnecessary."

SB 635 (Sher), as amended September 3, amends Health and Safety Code section 116365(c)(2) to clarify that "the determination of the toxicological endpoints of a contaminant and the publication of its public health goal in a risk assessment prepared by the Office of Environmental Health Hazard Assessment are not subject" to APA's rulemaking requirements (see 1999 OAL Determination No. 17 above). Governor Davis signed SB 635 Sher on October 7 (Chapter 777, Statutes of 1999).

AB 1295 (Firebaugh). Existing law exempts the Department of Personnel Administration (DPA) from the APA with respect to regulations that apply to state employees in State Bargaining Unit 5, 6, 8, 16, or 19, and provides alternative procedures for DPA to use in the adoption, amendment, or repeal of regulations applicable to those state employees. As introduced in February 1999, this bill would instead exempt DPA, except as specified, from the regulation and rulemaking provisions of the APA with respect to regulations that apply to (1) state employees who are excluded from the Ralph C. Dills Act, and (2) state employees for whom a memorandum of understanding has been agreed to by the state employer and the recognized employee organization. This bill would provide that the Department's regulations are subject to the APA's requirement that regulations meet the standards of necessity, authority, clarity, consistency, reference, and nonduplication, and that existing regulations be reviewed. *[A. PERet&SS]*